

Considerations Arising from the Public Dissemination of

CRS Products

Potential Impact

- **Loss of Speech or Debate Protection and Confidentiality** – The transformation of CRS from a sole support arm of the Congress to a regular provider of reports to the public may put at risk constitutional speech or debate protections that have been recognized by the courts in the past, and which are critical to the maintenance of confidentiality for the Congress, even if confidential memoranda continue to be withheld from public scrutiny. Without the application of the privilege to CRS, CRS analysts may be required to testify about the advice they provide to Congress. Public dissemination could also leave CRS more vulnerable to a variety of judicial and administrative proceedings, including litigants seeking the discovery of files of CRS analysts and attorneys or requests made by Members and committees, and claims for damages being levied against CRS staff. In previous instances in which CRS has been involved in litigation or agency proceedings, the judicial or agency decision has recognized that CRS staff functions as an adjunct of Member and committee staff and that CRS performs a function protected by speech or debate clause immunity (see, *Webster v. Sun Oil*, 731 F.2d 1, 3 (D.C. Cir. 1984) (communications to CRS analysts are within scope of common law privilege for communications to a legislative body); *Smith v. IRS*, No. 3778-89 (Tax Ct. 1990) (protecting from compulsory process background materials used by CRS staff in preparing reports and memoranda for Congress); *In re Exxon Corporation*, 95 F.T.C. 919 (1980) (FTC subpoena for CRS documents barred by speech or debate immunity and separation of powers doctrine; CRS performs an “essentially legislative function”)). This could be lost. The General Counsel for the House of Representatives and the Senate Legal Counsel could find that they may be required to expend significant additional time and resources in trying to defend CRS against judicial and administrative proceedings.
- **Change in mission and focus** -- There is a significant risk that wide publication could over time affect the mission and congressional focus of the Service. Widespread public access to CRS Reports could cause analysts to become more conscious of the need to address views, methods, disciplines, and expectations of a non-congressional audience, and thereby shift the emphasis of research products away from their current focus on the congressional audience. Another likely outcome is that a large public reaction would be generated by CRS Reports, especially on controversial topics, and CRS would need to respond, thereby diverting effort from the single CRS mission of direct service to Congress in support of its legislative responsibilities.
- **Impairment of Member Communication with Constituents** -- Members have long made CRS products available to interested persons either directly, by inclusion in congressional publications, or more recently through their office or committee websites. Wholesale public dissemination has the potential to interfere with the direct relationship between constituents and their representatives. Placing a third party, in the form of either

CRS as the source of public access to all of its reports or some other central source (even one of the House or Senate websites), might lead CRS to be seen as speaking for Congress, thereby potentially threatening the dialogue on policy issues between Members and those they represent that was envisioned by the Constitution. The current practice of select dissemination of CRS materials to constituents preserves the opportunity for Members to exercise discretion in performing their informing function as the elected representative of the citizenry, while also preserving the notion that CRS is acting as congressional support staff in making the information available for dissemination by the individual Members. Although most Members appreciate the quality of CRS Reports, certainly no Member agrees with the content, analysis, or arguments contained in every CRS Report, yet the loss of selective dissemination can create the appearance that all Members agree with the perspectives presented in the reports. Congress may be seen as “speaking through” CRS and its reports.

- **Increase in Future Pressure for Release of Confidential Memoranda --** Once CRS Reports are officially released directly to the public, there is the potential for transparency groups and media outlets to begin lobbying next for the release of confidential memoranda and other products. This may be especially true if public dissemination causes CRS to cut back on the number of CRS Reports released every year and increase the number of confidential memoranda as a better vehicle for analyzing legislative issues for congressional clients. If confidential memoranda were ever to be released to the public in a wholesale manner, the entire mission and focus of CRS service for the Congress would be irrevocably altered. Members would lose CRS as a “safe harbor” for exploring policy options, floating legislative proposals, and expanding their knowledge base in a confidential setting free from partisan influence.

Likely Impact

- **Costs of setting up mechanisms for public distribution --** There is the likely potential for CRS incurring significant costs in any process of creating an effective system for making CRS work available to the public, including the cost of a likely increase in the volume of tailored individual requests for Members and committees, the establishment of a Public Affairs-type Office to oversee the dissemination of products, and the hiring of additional staff to edit work intended for public distribution. This will result in resources being subtracted from direct service to the Congress.
- **Intensified Partisan and Special Interest Pressures --** Widespread public dissemination will almost certainly increase partisan and special interest pressure on CRS as groups and individuals try to influence the research and analysis that Congress relies upon. Even with CRS author names and telephone numbers removed from CRS Reports, the public will find ways of contacting CRS and will be intent upon arguing against or commenting on the viewpoints presented and the sources and information relied upon.

Such pressure from the public, especially on those issues most likely to incite public passion, could subtly affect the way CRS authors write their reports. This could lead to the perception, if not the reality, of an increased politicization of CRS and its products. Congress may ultimately benefit less from the information in CRS Reports as content becomes modified to reflect public understanding of issues and to mitigate against a strong public reaction.

Additional Steps CRS will need to take in reaction to wholesale public dissemination

- **Removal of Author Information from CRS Reports** – CRS will need to remove the name of the author and the contact information from CRS Reports before they are made public in wholesale fashion. This step will require a modification to the current Authoring and Publishing tool that CRS uses to prepare and publish its reports for Congress, and it will make it more difficult for congressional clients to efficiently and expeditiously identify CRS specialists to address their requests.
- **Costs of Setting-up a New Office for Public Inquiries** -- Wholesale dissemination will generate a significant number of comments, questions, and concerns from the public regarding content. With the CRS name on the report cover, the public will naturally try and contact the Service. Even if the Senate or House distribute the reports from a congressional website, questions regarding the work of CRS will almost certainly be forwarded to CRS in order to enable Members to respond to their usual volume of constituent concerns and observations. In addition to placing a burden on congressional offices, this could significantly increase the amount of time that CRS would have to devote to such responses, thereby diverting effort from the single CRS mission of direct service to Congress, and will require CRS to fund additional resources to increase the size of its current Communications Office or Congressional Services Section, or create a new public affairs-type office.